

Exhibit 1

To Reply Brief

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE GOOGLE DIGITAL
4 ADVERTISING ANTITRUST
LITIGATION,

21 md 3010 (PKC)

Conference

7 -----x

8 New York, N.Y.
May 21, 2024
9 3:12 p.m.

Before:

10 HON. P. KEVIN CASTEL,

11 District Judge

12 APPEARANCES

13 BOIES, SCHILLER & FLEXNER LLP
14 Attorneys for Publisher Class
15 BY: PHILIP KOROLOGOS
IZAACK EARNHARDT

16 GIRARD SHARP LLP
17 Attorneys for Advertiser Class
18 BY: SCOTT M. GRZENCZYK

19 KELLOG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
Attorneys for Daily Mail & Gannett
20 BY: JOHN THORNE
DANIEL G. BIRD

21 HERMAN JONES
Attorneys for Plaintiff Inform
22 BY: JOHN C. HERMAN

23 AHDOOT & WOLFSON, PC
24 Attorneys for Advertiser Class
25 BY: HENRY J. KELSTON

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BY: SEAN MURRAY
ROBERT J. McCALLUM

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1 (Case called)

2 MR. KOROLOGOS: Good afternoon, your Honor. Philip
3 Korologos with Boies, Schiller & Flexner for the publisher
4 class.

5 THE COURT: Good afternoon, Mr. Korologos.

6 MR. GRZENCZYK: Good afternoon, your Honor. Scott
7 Grzenczyk with Girard Sharp for the advertiser class.

8 THE COURT: Good afternoon.

9 MR. THORNE: Good afternoon, your Honor. John Thorne
10 for Daily Mail and Gannett.

11 THE COURT: Thank you.

12 MR. HERMAN: Good afternoon, your Honor. John Herman
13 from Herman Jones for plaintiff Inform.

14 THE COURT: Thank you.

15 MR. KELSTON: Good afternoon, Henry Kelston of Ahdoot
16 & Wolfson for the advertiser class.

17 THE COURT: All right.

18 MR. EARNHARDT: And Izaak Earnhardt, from Boies,
19 Schiller & Flexner for the publisher class.

20 THE COURT: Okay.

21 MR. BIRD: Good afternoon, your Honor. Daniel Bird
22 from Kellogg Hansen for Daily Mail and Gannett.

23 THE COURT: All right.

24 MR. BURKE: Good afternoon, your Honor. Chris Burke
25 of Korein Tillery for the publisher class.

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1 THE COURT: Good afternoon.

2 MR. REISER: Good afternoon, your Honor. Craig Reiser
3 Axinn, Veltrop & Harkrider, LLP, for the Google defendants.

4 MR. JUSTUS: Good afternoon, your Honor. Bradley
5 Justus from Axinn for Google. We also have our colleagues
6 Caroline Boisvert and Eva Yung.

7 MR. McCALLUM: Good afternoon, your Honor. Robert
8 McCallum, Freshfields, for Google.

9 MR. MURRAY: Good afternoon, your Honor. Sean Murry,
10 Freshfields, for Google.

11 THE COURT: Good afternoon to you all. I hope all is
12 well with Ms. Vash. Her absence is noted.

13 MR. HERMAN: Your Honor, she's out of town and
14 couldn't attend today.

15 THE COURT: All right. Good.

16 MR. HERMAN: I will try to do her justice.

17 THE COURT: All right. Do your best. So speaking of
18 doing your best, let's take up the Inform interrogatory
19 situation to begin with. So what do you want to tell me? Or I
20 could just give you my questions and you can respond to those.

21 MR. HERMAN: I would be happy to do it however your
22 Honor wishes. I can just give you very quickly our view.

23 THE COURT: Okay.

24 MR. HERMAN: Is we have had very little case specific
25 discovery.

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1 THE DEPUTY CLERK: Speak into the microphone, please.

2 MR. HERMAN: Yes. We've had some documents, but we've
3 had no interrogatory, no chance to ask case specific
4 interrogatories at this point. We did respond to 30 case
5 specific interrogatories that Google served on us. Our concern
6 is while there has been voluminous discovery in the case, there
7 hasn't been voluminous case specific discovery in the Inform
8 case with the exception of the discovery that Inform has
9 provided to Google. And let me give you an example. We have
10 produced over 17,000 communications between Inform and Google.
11 Google has produced few, if any, communications between Inform
12 and Google. And that's of great concern to us. So when we're
13 asking --

14 THE COURT: So what you're suggesting is though you
15 have proof positive that the communication in written form
16 transpired, Google's copy of the corresponding e-mail has not
17 been produced?

18 MR. HERMAN: That's correct, your Honor.

19 THE COURT: Okay.

20 MR. HERMAN: And that gives us concern about what the
21 level of the case specific discovery that Google has provided
22 to us is. We've obviously gone through what documents they've
23 provided to us.

24 THE COURT: Well, how about this, you said 17,000 you
25 produced. And you said something about little from Google.

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1 What's little?

2 MR. HERMAN: So we have not identified a single e-mail
3 that transpired between Inform and Google in the Google
4 document production. We have seen a handful of e-mails, and by
5 a handful I mean maybe 100 or so where --

6 THE COURT: Handful has gotten bigger in recent years.
7 Go ahead.

8 MR. HERMAN: Where Inform sent an e-mail to Google and
9 it got circulated within Google to various Google teams and
10 popped up in the discovery. But the actual e-mail itself, the
11 first initial communication, doesn't appear in the document
12 production.

13 THE COURT: Let me turn to Google. How can this be?

14 MR. McCALLUM: Your Honor, Robert McCallum for Google.
15 If I could just address briefly the background to this. And
16 obviously it's been --

17 THE COURT: You may be seated, sir.

18 MR. HERMAN: Thank you, your Honor.

19 MR. McCALLUM: There have been obviously some very
20 substantial production by Google, some 6 million documents and
21 your Honor may recall the context to the protracted search term
22 and custodian negotiations in this case, where last year there
23 were a series of those meetings starting in the spring going
24 all the way to November, and then there was a hearing before
25 your Honor on November the 2nd, where your Honor ruled on the

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1 outstanding search term and custodian issues. And on that day
2 Inform effectively carved themselves out of your Honor's ruling
3 and went on a separate track to negotiate their own custodians
4 and search terms with Google.

5 That process has played out and taken it has taken
6 several months and after I would say bumps in the road in the
7 beginning, I am pleased to report the more recent interactions
8 between the parties have been collaborative and cordial, and I
9 think we made a lot of progress. To the point where we made
10 our first production of Inform specific documents was made last
11 month, and that was a product of Google agreeing to all ten of
12 Inform's proposed Inform specific custodians, and we ran
13 preexisting search terms, the already agreed 200 plus search
14 terms over that population.

15 Since then, there have been continuing search term
16 negotiations where we reached agreement two weeks ago on an
17 additional category of 35 search terms. Those documents have
18 been pulled and are being reviewed now, and overnight I think
19 we got confirmation this morning from Inform that the final
20 tranche of six terms the parties have reached agreement on
21 those, and obviously that's going to take a little time to make
22 its way through the system.

23 So I would respectfully submit that the arguments
24 being made by Inform are somewhat premature at this time
25 because as a result of them taking themselves out of the

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1 November 2 process that applied to all other plaintiffs, it has
2 taken a little extra time to get the Inform specific documents
3 produced. But that of course comes again to the backdrop of
4 the 6 million plus documents that we've produced.

5 THE COURT: Thank you. So I understand that in the
6 case of Inform there's more to come. I was greatly relieved to
7 receive the letter reporting that there had been a breakthrough
8 and that I was not going to have to sit there and rule on
9 search terms and custodians in undoubtedly a very imperfect
10 way.

11 So here's a question I have for Inform. Thank you.
12 You're free to respond if you want to respond in any respect,
13 but I understand there's more coming by way of document
14 production.

15 MR. HERMAN: I think Mr. McCallum presented a fair
16 picture of what's going on.

17 THE COURT: All right. So let's look at interrogatory
18 number five. Ballpark, how many instances does Inform think
19 would fall within interrogatory number five? That handful of
20 100, ten handfuls, 100 handfuls, a thousand handfuls, a
21 trillion handfuls?

22 MR. HERMAN: This is wildly speculative, but it would
23 probably be in the hundreds and millions if not billions of
24 transactions.

25 THE COURT: Okay. All right. That's what I thought.

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1 And in each instance, Google should respond. I hope nobody
2 prints that out, that response. It would have an impact on the
3 world supply of paper. And I have a similar question as to
4 interrogatory number 7.

5 No, I think I have that wrong. I have that wrong.
6 Interrogatory number 6. Yes.

7 MR. HERMAN: Yeah. So if I may, your Honor.

8 THE COURT: Yes.

9 MR. HERMAN: Hopefully this will help address your
10 concerns. And fair concerns. I agree. Our hope was to get --
11 Google has made available some transaction level data that
12 encompasses the entirety of the auctions over a week period of
13 time. What we're looking for is that same data where you strip
14 out every other participant except for Inform, and to get that
15 data produced. It would show, you know, the bids, the winning
16 bid, the time, etc., for those various transactions. We're not
17 looking for four years' worth of data. We're looking for
18 finite set in the event we get to the damages phase and your
19 Honor gets presented with a *Daubert* motion, we want to make
20 sure we at least ask for it. In the event that we get it and
21 we can analyze and incorporate in our expert reports, it can be
22 beneficial. If on the other hand we don't get it, then
23 hopefully that would get used against us when the *Daubert*
24 motion gets filed.

25 THE COURT: Well, here's a question. Sounds to me

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1 like what you're looking for is the production of data, right?

2 MR. HERMAN: Fair, yes, your Honor.

3 THE COURT: That sounds to me like a Rule 34 request,
4 not an interrogatory.

5 MR. HERMAN: Our assumption would be Google would have
6 a 33(d) objection and produce the data in lieu of interrogatory
7 response.

8 THE COURT: I understand. I understand. But that's
9 the problem looking at the interrogatory. And you're going to
10 get the 33(d) objection. They're going to say we've produced
11 6 million. Now with what we're producing you, all in, it's
12 7 million. It's in there.

13 That's not very helpful either.

14 MR. HERMAN: Correct.

15 THE COURT: So that's why I'm not inclined to give you
16 5 or 6. We can talk about other things, but 5 and 6 give me
17 pause.

18 Now, I'll hear from Google on this, but my inclination
19 is to allow Inform to serve interrogatory 1, 3, 4, 7, A through
20 C, and E. But not D and F. And then on interrogatory 2, it
21 would depend on the -- I would not allow -- well, the second
22 sentence of interrogatory 2 you're only looking for contracts
23 or agreements not other documents; is that correct?

24 MR. HERMAN: That's correct, your Honor. I'm looking
25 at 2 is our affirmative -- that would be number 1 I believe,

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1 unless I'm mistaken.

2 THE COURT: No, no. Look at the second sentence of
3 interrogatory 2.

4 MR. HERMAN: Oh, I see that.

5 THE COURT: You're only looking for contracts or
6 agreements there; is that right?

7 MR. HERMAN: That's correct, your Honor.

8 THE COURT: Okay. So with regard to interrogatory 2,
9 it looks to me that I would allow it as to at least stating the
10 legal and factual basis of the affirmative defense. As to the
11 second, third, fifth, tenth affirmative defenses, not the
12 first, fourth, sixth, seventh, eighth, or ninth. And as to the
13 thirteenth -- not allow the eleventh, twelfth, but as to the
14 thirteenth, not only require the factual and legal basis, but
15 also the documents. The fourteenth, just the legal and factual
16 basis, but not the documents. The sixteenth, the legal and
17 factual basis, not the documents. Seventeenth, the legal and
18 factual basis and the documents. The eighteenth, the legal and
19 factual basis and the documents. And the twentieth, the legal
20 and factual basis, but not documents.

21 So that's what I'm inclined to do. I'll give Inform
22 the first shot at taking issue with that and then I'll give
23 Google the last shot at it.

24 MR. HERMAN: No issue with your Honor's ruling. I do
25 have a question for clarification.

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1 THE COURT: Yes.

2 MR. HERMAN: You had mentioned numbers 5 and 6.

3 THE COURT: Yes.

4 MR. HERMAN: Seeming more like Rule 34 requests.

5 THE COURT: Yes.

6 MR. HERMAN: Would it be agreeable to your Honor if we
7 served those as Rule 34 requests?

8 THE COURT: All right. That sounds reasonable. I'm
9 going to find out if there is an objection to that. That
10 sounds reasonable to me. Okay. Thank you.

11 MR. HERMAN: Thank you, your Honor.

12 THE COURT: So now I'll hear from Google. You can
13 start with a Rule 34 request relating to the two
14 interrogatories. I guess it's 5 and 6. Any objection?

15 MR. McCALLUM: Your Honor, we would object to
16 reserving those in the form of a Rule 34 request. We do agree
17 that they are not proper interrogatories and out are in fact
18 data RFPs and data RFPs layering on also an additional request
19 for a narrative response in certain places. What has happened
20 here is that we've --

21 THE COURT: Well, listen, it's been reformatted here.

22 MR. McCALLUM: Sure.

23 THE COURT: I presumptively ruled in your favor that
24 they're not proper interrogatories. You don't have to tell me
25 why I'm right, but appreciate that sometimes. But what's the

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1 problem with it being a Rule 34 demand?

2 MR. McCALLUM: The problem, your Honor, is that it's
3 duplicative of data requests that were served during the course
4 of the MDL -- I'm sorry, by the common MDL requests, if you
5 will, served by the discovery steering committee. We think we
6 have properly responded to the data requests.

7 With respect to the specific requests that Mr. Herman
8 made for a week of transactional log level sample data, we have
9 provided seven of those similar samples to the MDL plaintiffs
10 as a group. And the amount of burden involved in preparing one
11 of the samples that Mr. Herman is referring to takes several
12 months of engineering work by Google. Those are bespoke
13 collections that do not exist in the ordinary course of
14 business.

15 So we've explained this to Inform during the course of
16 our meet and confers with them, so as an alternative, we
17 pointed Inform to four different data sets that Google has
18 already produced, which we think contain material specifically
19 relevant to Inform. Those data sets date back to 2005, 2006,
20 2007, and one of the data sets goes back to 2012, which we
21 think are appropriate relevant time periods for Inform. We've
22 provided them information from Google data dictionaries to try
23 and walk them through how those data requests are responsive to
24 their specific issues. And we thought, your Honor, that as of
25 around middle of March, we had actually resolved these data

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1 requests. So we were a little surprised to see that data
2 request be resuscitated in the form of this interrogatory
3 request.

4 So for those reasons, we would respectfully submit
5 that whether as an interrogatory or now as reformatted as a
6 Rule 34 request, it's duplicative of data requests that Google
7 has already responded to.

8 THE COURT: All right. Well, what's the response --
9 what's the harm in the Rule 34 request being served, and your
10 responding you have this. We've given it to you. Period.

11 MR. McCALLUM: There's no prejudice to Google in that
12 scenario.

13 THE COURT: Okay. If that's your position, then the
14 plaintiff is protected in the sense that you have made a
15 representation that you have produced them. And if you have,
16 you have. If you haven't, you have a problem.

17 Let me hear from Inform. Does that work for you?

18 MR. HERMAN: That would work, your Honor.

19 THE COURT: Okay. And I will just shorten the time on
20 the response to the Rule 34 request to 14 days. It shouldn't
21 take you very long -- well first of all, you're going to serve
22 this in seven days. Can you serve this in seven days?

23 MR. HERMAN: We'll serve it by Friday.

24 THE COURT: Yeah. Okay. And you can respond in 14
25 days?

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1 MR. McCALLUM: Responses and objections in 14 days?

2 THE COURT: Yes, but the responses and objections
3 you're representing to me, I don't want to find out I got
4 snookered here. You're going to say in your response we object
5 because we've produced this already. Not we object, it's
6 burdensome. We haven't advanced the ball and I've wasted my
7 time.

8 MR. McCALLUM: There would be the two different data
9 sets that I just referenced, your Honor, I think would be
10 treated differently. One pointing Inform to the materials that
11 we have already pointed them to, which is the four data sets
12 that I referenced, which we thought had resolved the dispute.
13 We would be pointing in our R&O's to those datasets but we
14 would preserve our burden objections with respect to Inform's
15 request to creating any kind of new custom bespoke dataset that
16 does not exist in the ordinary course of business because those
17 could take months.

18 THE COURT: All right. I can rule on that. That's
19 fine. Fourteen days.

20 And with regard to the other interrogatories, you have
21 my tentative ruling. Is there anything you wanted to say on
22 any of the others?

23 MR. McCALLUM: I would just say, your Honor, with
24 respect to interrogatory number 1 and interrogatory number 4, I
25 think those will fall into the category of matters that are

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1 covered by the current discussions as to search terms and
2 custodians. So when it comes to identifying contracts,
3 invoices, billing, or account statements, we think that those
4 would be in Inform's position --

5 THE COURT: Swept up in the -- yes.

6 MR. McCALLUM: But also swept up, so we would reserve
7 the right to not go through and identify those contracts,
8 specifically as opposed to referring to the production I think
9 the same would apply with respect to interrogatory number 4.

10 THE COURT: All right. So it may be that otherwise --
11 well, I'll tell you what, you can have three weeks to respond
12 to the full set of interrogatories. Some of them are going to
13 require you to identify the legal and factual basis for a
14 claim, and I think that's fine when you have something
15 reasonably specific like plaintiff's claims are barred in whole
16 or in part because they were relinquished by plaintiff through
17 contract with Google.

18 And there's another, relating to contractual agreement
19 including a provision that provides disputes will be resolved
20 through arbitration. I don't think it's burdensome to require
21 you -- I'm using those two examples but applies elsewhere -- to
22 respond with the legal and factual basis, and in those
23 instances and in several other I mentioned, the documents that
24 support it. That shouldn't be a treasure hunt through
25 6 million documents for the plaintiff.

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1 MR. McCALLUM: Understood, your Honor.

2 THE COURT: Good.

3 MR. McCALLUM: I would just say with respect to
4 interrogatory number 9, we did view that as calling for a
5 longer narrative response, which was the basis of our
6 objections in our papers. I'm hearing your Honor's preliminary
7 findings.

8 THE COURT: Yes.

9 MR. McCALLUM: That it would be A, B, C, and E in
10 scope, but not D and F; is that correct?

11 THE COURT: That's correct.

12 MR. McCALLUM: Okay.

13 THE COURT: That's correct.

14 MR. McCALLUM: I understand the Court's position.
15 Thank you, your Honor.

16 THE COURT: Okay. So that's going to be my ruling on
17 the interrogatories. And the responses to the interrogatories
18 are going to be due 21 days from today.

19 All right. And I'm going to mark the motion for
20 additional search terms and custodians as withdrawn without
21 prejudice. So if you're negotiations fall apart, you'll have
22 the opportunity to come back. All right?

23 MR. HERMAN: Thank you, your Honor.

24 THE COURT: Okay. Now let me find out what is
25 outstanding with regard to the advertiser class request to

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1 serve interrogatories. I think it's limited now to
2 interrogatories 14 and 15; is that correct?

3 MR. GRZENCZYK: Yes, your Honor. That's correct. I
4 think all the other ones Google represented that they don't
5 have an objection to.

6 THE COURT: Okay. So tell me the magic in 14 and 15?

7 MR. GRZENCZYK: Well, I can give you a brief overview
8 of those, your Honor, but I also think that I haven't had a
9 chance to confer with defendants, obviously, about this. Some
10 meeting and conferring might be helpful.

11 THE COURT: Some what?

12 MR. GRZENCZYK: Meeting and conferring might be
13 helpful further because of some of the guidance you've provided
14 today.

15 THE COURT: All right. So how does that sound to
16 Google?

17 MR. McCALLUM: We're happy to continue to meet and
18 confer.

19 THE COURT: Okay. So you'll be back to me let me know
20 if that can be withdrawn or withdrawn without prejudice, or
21 whether it needs to be ruled on.

22 MR. GRZENCZYK: Sure. And I think we can do that
23 promptly enough to keep whatever the current schedule would be
24 for oppositions and replies for that.

25 THE COURT: Right.

O5LAGooC

1 MR. GRZENCZYK: And, yeah, we're willing to do that
2 and report to you what the outcome is.

3 THE COURT: All right. Now, let me hear the bid and
4 the ask on answering the state law claim. So I think I
5 indicated that with regard to the state law claims, the
6 defendants' assertion that the state law claim fails to state a
7 claim for relief can be preserved for the summary judgment
8 stage, and my recollection is there was no objection by anyone
9 to that proposal. Correct so far?

10 MR. THORNE: Yes, your Honor. For Gannett, Daily
11 Mail, that is correct.

12 MR. REISER: Craig Reiser for Google. We did object
13 to the proposed amended complaint on the basis of it not
14 containing any new allegations that supported a claim and also
15 prejudice to Google by virtue of the fact that we've seen Daily
16 Mail in particular play fast and loose with which allegations
17 it's actually pursuing in support of its state law claims.

18 THE COURT: But I did allow the filing.

19 MR. REISER: You did allow the filing, correct.

20 THE COURT: I did allow the filing and I suggested
21 that your legal objections would be deferred to the summary
22 judgment phase. And you have no objection to that?

23 MR. REISER: That was your ruling and certainly we
24 respect your Honor's ruling.

25 THE COURT: Okay. So now the question is why require

O5LAGooC

1 an answer?

2 MR. THORNE: So, your Honor, Google did answer the
3 antitrust claims after your prior decision.

4 THE COURT: Okay.

5 MR. THORNE: They have not answered the state law.

6 THE COURT: Okay. That's what we're talking about.

7 MR. THORNE: So the burden is admit, deny, admit,
8 deny. And the burdens seem pretty small. And it's possible if
9 Google admits anything that that would reduce what we have to
10 still finish discovery using the new depositions that you
11 granted us a little while back. But the one thing that
12 actually worries me, that I think is important, is if Google
13 has a really important new defense, new affirmative defense
14 that they want to assert, they're waiting until summary
15 judgment to do that and preventing us getting discovery of
16 that.

17 For example, they had an affirmative defense against
18 the DOJ case down in Virginia related to publishers. Judge
19 Brinkema struck that, but if there's a surprise defense, I
20 think we should know about that before discovery and I don't
21 think it's that hard to say affirm, deny to the allegations.
22 There are not that many allegations.

23 MR. REISER: Your Honor, the problem we have is we
24 don't know exactly what is within their state law claims, which
25 is why we wanted to file motions to dismiss under Rule 12 to

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1 clarify what's in and out. One example I can provide your
2 Honor, which I think was in our papers about that --

3 THE COURT: Well, if I grant the motion under Rule 12,
4 12(b)(6) or 12(c), it's out. The claim is out.

5 MR. REISER: No, that's right. And we don't get to
6 file that motion until the summary judgment stage at this point
7 based on your Honor's ruling. And the point I was trying to
8 make --

9 THE COURT: Did you file an objection to the proposal?
10 Because it was put as a proposal is my recollection that it be
11 deferred to the summary judgment stage.

12 MR. REISER: We did. We did assert that we believed
13 we would be prejudiced in part for the reason I was about to
14 posit, which is --

15 THE COURT: Go ahead.

16 MR. REISER: We do not understand exactly what they
17 are claiming in their state law claims. In response to your
18 Honor's March 1 ruling, they made a production to us and told
19 us that they were withholding, this is Daily Mail specifically,
20 they were withholding documents that were relevant only to the
21 search related claims that your Honor dismissed. We've
22 followed up with them for two months to try to understand what
23 that means. Are they claiming, for example, in aid of their
24 state law claims under GBL 349 or common law fraud that the
25 search allegations your Honor dismissed under federal law are

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1 part of their case, and we haven't gotten an answer. They did
2 finally on Friday, this past Friday, agree to produce those
3 documents but we don't -- the reason we can't answer and we
4 can't tell -- we can't say whether we have additional defenses
5 is we don't know what's in or out and that's the bargain that I
6 think they struck when they asked your Honor to defer until the
7 summary judgment stage any briefing under Rule 12.

8 THE COURT: The reason that doesn't make any sense to
9 me is if I say right now you can move to dismiss, I'm going to
10 reverse myself. Can you move to dismiss? How does that help
11 you? Because I'm not staying discovery.

12 MR. REISER: Well, we would move to dismiss any state
13 law claims to the extent they were predicated on anything your
14 Honor dismissed as improper to state a claim under the federal
15 antitrust laws.

16 THE COURT: Yeah. And how would that help you?

17 MR. REISER: We would have your Honor's ruling and
18 we'd continue discovery on the assumption --

19 THE COURT: No, you wouldn't.

20 MR. REISER: We would continue discovery on the
21 assumption that everything in their state law claims, as we
22 understand them, which based on their representation would not
23 include anything pertaining to search is out, and we would
24 proceed to summary judgment and get a ruling from your Honor
25 whenever your Honor was ready to rule.

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1 THE COURT: Right. All right. So what I'm going to
2 direct you to do is file an answer without prejudice. It's
3 without prejudice your position that the claims do not state a
4 claim for relief or are otherwise barred from my ruling. I'm
5 just not staying discovery.

6 MR. REISER: Understood, your Honor.

7 THE COURT: So would it be convenient to get that
8 answer in within 21 days?

9 MR. REISER: Yes, your Honor.

10 THE COURT: Okay. That's great. That's fine. Thank
11 you very much. I think that resolves that issue.

12 MR. THORNE: Thank you, your Honor.

13 THE COURT: So let me move up the question of the
14 application to serve interrogatories filed I think it might
15 have been at midnight or right before midnight. Which was it?

16 MR. McCALLUM: I believe it was about a minute before
17 midnight, your Honor.

18 THE COURT: All right. I'm not going to address that.
19 You have some guidance here. And, in fact, in this district,
20 as reflected in the Local Civil Rules, interrogatories rarely
21 are the key to anything. I once had a judge tell me when I was
22 in private practice that nobody ever won a case on an
23 interrogatory response. And what I should have done was just
24 agreed with him. But I was young and foolish and I pointed out
25 that I had a case where it was a breach of contract action, we

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1 asked the other side to set forth the circumstances under which
2 this contract could be terminated. It was allegedly a contract
3 in perpetuity. And they responded there were no circumstances
4 under which it could be terminated. We promptly moved under
5 the statute of frauds and won the case.

6 But those examples are few and far between with
7 interrogatory responses. And usually the information can be
8 obtained otherwise.

9 There are some instances, like I've pointed out with
10 some, not all of the affirmative defenses, but some, if you're
11 going to say oh, this is barred by an arbitration agreement,
12 well, do tell us more. What arbitration agreement are you
13 talking about? It's fair to require certain explication and
14 that's true even with market definition. Well, okay, you know,
15 what market are you in, and who else is in that market? An
16 interrogatory can be useful in that sort of a thing. But just
17 to play games with dualing interrogatories, you're going to
18 find I'm going to swat it down as well I should.

19 But negotiate. Get to the things that can't be
20 obtained, unless there's an interrogatory, where you're in the
21 dark, your client is in the dark and you're entitled to know,
22 and that's going to be the kind of interrogatory that I'm
23 likely to allow.

24 MR. McCALLUM: If I may respond very briefly, your
25 Honor.

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1 THE COURT: Yeah.

2 MR. McCALLUM: The request made by Google last night,
3 the timing was not driven by this hearing this morning. The
4 timing was driven because we have to file -- these are
5 exclusively contention interrogatories that are due at least 30
6 days prior to the discovery cutoff date, and we had met and
7 conferred with the plaintiffs and we understood that there may
8 be a dispute as to whether they would consent to these. And
9 we're happy to continue to meet and confer with them, but we
10 would like the opportunity to submit exclusively contention
11 interrogatories similar to nature to those that the Court has
12 approved for the plaintiffs.

13 THE COURT: Well, it sounds like I'm going to be
14 allowing that, but I want you to hammer it out and send it to
15 me if there are any remaining disagreements on it, and let's
16 see what I do with it. I'll try to get to it promptly.

17 MR. McCALLUM: Thank you, your Honor.

18 THE COURT: And I guess the next item on the agenda is
19 the request -- this one has been pending much longer. It was
20 filed at 10:00 last night, so I've had it for an additional two
21 hours to study. This was plaintiff's request to extend the
22 expert discovery dates by 43 days, a modest proposal, because
23 when I look at it, it looks like it's an extension request
24 to -- I haven't studied it, I think it was April 2025.

25 So I'm going to take that under advisement and I'm

O5LAGooC

1 going to get you a ruling on or about July 1.

2 MR. KOROLOGOS: On or about July 1 you'll rule on the
3 scheduling?

4 THE COURT: Extension request.

5 MR. KOROLOGOS: Well --

6 THE COURT: You know why?

7 MR. KOROLOGOS: That would require us to do a bunch of
8 the work in advance, your Honor. But on a schedule that I
9 assume your Honor is basing on the first business day after the
10 close of fact discovery.

11 THE COURT: That's exactly what I'm basing it on
12 because, not you Mr. Korologos, I know you better than that,
13 but there are some lawyers who might be tempted to use it as a
14 nose under the tent. And might say, well, your Honor has
15 extended the expert discovery, we'll run this fact discovery
16 concurrently and it won't extend the extended schedule any
17 further. So I'll wait until July 1 and then I'll function on
18 it.

19 MR. KOROLOGOS: Understood, your Honor.

20 THE COURT: So that's that. And what else?

21 MR. KOROLOGOS: Your Honor, I believe the remaining
22 issue is the motion for protective order by Google with respect
23 to our Texas subpoena.

24 THE COURT: Yes, it is. Yes, it is. So here's what I
25 want to hear about is are any of the deponents that were taken

O5LAGooC

1 in the Texas action deponents that the plaintiffs have
2 requested to take in this action but have not yet taken?

3 MR. KOROLOGOS: Yes, your Honor.

4 THE COURT: Okay.

5 MR. KOROLOGOS: There are I believe three or four such
6 witnesses.

7 THE COURT: All right.

8 MR. KOROLOGOS: That are yet to be taken, but have
9 been noticed. That our understanding, even though we don't
10 have all of the notices in the Texas case, our understanding is
11 they either have been deposed or very shortly will be deposed
12 in the Texas matter.

13 THE COURT: All right. Let me ask you the next
14 question. Do you anticipate economies in maybe a shorter
15 deposition by getting the transcript of the deposition in the
16 Texas action?

17 MR. KOROLOGOS: I think that it would certainly assist
18 us in being more efficient with the deposition. However, I'm
19 not sure that we can reduce the amount of time we would take
20 with the witness given that that deposition and its usefulness
21 in this case as a deposition in this case is different. That
22 will be a document. It's prior testimony in a different
23 action. But it is not the same as taking the deposition in our
24 case.

25 So we may know better, for instance, what we expect

O5LAGooC

1 the answers to questions to be and be able to therefore
2 anticipate that, but we're still going to have to ask those
3 questions in order to be able to use them the same way in this
4 case as though it's a deposition taken in this matter.

5 THE COURT: Well, let's talk about that. If it's a
6 Google witness, then Google is going to have to bring the
7 witness to trial or the transcript is going to be usable,
8 right?

9 MR. KOROLOGOS: It should be if it's still -- if it
10 was a current --

11 THE COURT: If it's a current employee. If it's a
12 current employee. Very good point. And that would be true
13 whether it was taken in this action or in the Texas action.

14 MR. KOROLOGOS: I believe that's correct, your Honor.

15 THE COURT: Yeah. And the deposition in the Texas
16 action could be used for cross-examination purposes, just as
17 the deposition taken in this action could be used.

18 MR. KOROLOGOS: Yes.

19 THE COURT: So I'm disappointed to hear that you would
20 expect it to permit certain efficiencies, but not really.
21 There would be efficiencies, but you would want to ask the
22 identical questions over again.

23 MR. KOROLOGOS: Well, I do believe it would be more
24 efficient. Lawyers being lawyers, and we have multiple parties
25 taking one day of deposition of these three or four witnesses,

O5LAGooC

1 I think it is difficult before seeing the transcript in the
2 Texas case to understand just how much we might be able to save
3 with that. One of our issues is we have difficulty even
4 knowing who has been deposed in Texas, let alone what they have
5 said. And so I think that it's very difficult in a vacuum to
6 limit ourselves just based on transcripts that we completely --

7 THE COURT: I understand, and I don't have a clear
8 path to how you would articulate a limitation anyway. But I
9 wanted to find out, I do want to from Google why they wouldn't
10 say, Judge, we would be delighted to have the plaintiffs have
11 this deposition and be able to use it as if it were taken in
12 this action if it means that we won't have non-duplicative
13 questioning at the deposition. But I haven't heard them say
14 that yet. So, so far, there's been nothing said on that. So
15 let me hear from Google.

16 MR. JUSTUS: Thank you, your Honor. I think it's
17 important to level set on what this request is. So we are near
18 the end of fact discovery.

19 THE COURT: They've asked for this.

20 MR. JUSTUS: They've asked for this.

21 THE COURT: I'm having a conversation now on this.

22 MR. JUSTUS: Yeah. So talking only about the four,
23 where someone has been deposed in the Texas case and has also
24 been the subject of a deposition notice in this case, we think
25 that the cleanest way is just to deny this production entirely

O5LAGooC

1 and tell them to go take a new depo. But if the Court said,
2 you know what I'm going to deny -- I'm going to issue a
3 protective order, preclude all of those subpoenas from coming
4 in, except for these four, then I think we can work with the
5 plaintiffs to come up with guardrails on those four.

6 THE COURT: You know what, it's a very interesting
7 position you take. It's a little bit unusual in my experience.
8 You can be seated. Because most of the time, I've seen a
9 defendant doesn't want to have his witnesses examined on
10 multiple occasions. Human nature being what it is, there are
11 different versions. They're not identical. They're argued to
12 be contradictions and anything a counsel can do to prevent his
13 client from being deposed twice on similar subjects, there's
14 usually a desire to do cartwheels to avoid that.

15 MR. JUSTUS: If I --

16 THE COURT: But I don't hear that here.

17 MR. JUSTUS: If I may, your Honor. So we certainly
18 agree that if these four deposition transcripts are produced in
19 this case, that they should not have any right to depose those
20 folks again, because they have been deposed in Texas and they
21 shouldn't be burdened again. We certainly agree with that.

22 My point was only that if the Court is considering
23 ruling that only these four depositions are in dispute for
24 potential cross production, we'd be willing to talk about
25 something around those four depos with the plaintiffs. But of

O5LAGooC

1 course ex ante, we don't want our folks to sit twice.

2 THE COURT: Okay. I'm glad you clarified that because
3 I didn't get that the first go round at all. But that's all
4 right. Thank you.

5 Mr. Korologos, I guess the question is what's your
6 best case for basically arguing, I don't know who these people
7 are, I don't know what they do for a living, but if somebody in
8 Texas thought they should have their deposition taken, I want
9 to see what the questions were and what the answers were.
10 What's your best pitch for that? Because I certainly already
11 I'm not inclined to allow wholesale piggybacking on somebody
12 else's discovery requests. You're free to take any deposition
13 you want within the limitations that have been set and ask what
14 you want. And if you get the answers, that's it. But saying
15 that the deposition of X -- I don't even know who X is, I don't
16 know who he works for -- is relevant to this action because the
17 guy in Texas thought it was relevant doesn't sound to me very
18 persuasive.

19 MR. KOROLOGOS: Let me address that, your Honor.

20 I think there are a few different categories we can
21 talk about. One, a category that I think we could carve out
22 from this case are depositions of Google employees who were
23 deposed because their principal role was to interact with a
24 state agency that engages in advertising with Google.
25 Essentially client representatives, not a legal client, the

O5LAGooC

1 customer representatives. Those we care a lot less about.

2 Somebody who was deposed, however, in the topics that
3 overlap between this case and the Texas case, we think is fair
4 game for this case because at this time certainly relevant to
5 the extent there's overlap -- and I'll come back to that, and
6 it is a party admission as to what they have said about this in
7 another proceeding. Now, what is that overlap? Google says
8 that the Texas case now focuses on other things. It focuses on
9 the Deceptive Trade Practices Act claim, and less so on the
10 antitrust claim.

11 First of all, none of the claims have been dismissed
12 in Texas. It's the same complaint that was before your Honor.
13 And in fact, that's at ECF Docket Number 541. But if you look
14 at the Deceptive Trade Practices Act portion of that complaint,
15 and I'm reading from the page 5 of 260, which is the Table of
16 Contents of that complaint, which has a Section IX, Deceptive
17 Trade Practice Violations:

18 A. Google misled and deceived advertisers regarding
19 Reserve Price Optimization.

20 B. is about dynamic revenue share.

21 C. is about Project Bernanke.

22 D. is about header bidding.

23 These are all things that are already in our antitrust
24 claims as anticompetitive acts.

25 THE COURT: And what are you reading from?

O5LAGooC

1 MR. KOROLOGOS: I'm reading from the table of contents
2 of the Texas complaint, which was filed here, but it's still
3 the operative case in Texas.

4 THE COURT: I understand the correlation between the
5 complaint in this action and the complaint in the Texas action.

6 MR. KOROLOGOS: Right.

7 THE COURT: I vividly recall the connection between
8 the two.

9 MR. KOROLOGOS: And as a result, your Honor,
10 depositions other than I think this category I've carved off of
11 the customer representatives, that is going to relate to the
12 same factual basis in this case. Those are statements by
13 Google about facts in this case that we do not have but Google
14 has. It's the same counsel in that case. We deserve a fair
15 understanding of the same facts that they have before trial, so
16 that we can understand -- including before summary judgment and
17 class certification -- the facts that they have in their minds
18 preparing their case, so that we can likewise prepare our case.
19 That's what discovery is about and that's what we want.

20 THE COURT: All right. So let me hear from Google.
21 First of all, the burden doesn't sound great. How many
22 depositions are there?

23 MR. JUSTUS: I think it would be roughly 20.

24 THE COURT: Twenty?

25 MR. JUSTUS: Yes. Roughly.

O5LAGooC

1 THE COURT: And now with the carve out of anyone who
2 principally dealt with states as customers?

3 MR. JUSTUS: I'm not sure that reduces the number at
4 all.

5 THE COURT: Yeah. I got it. Okay. Not surprised.
6 All right. So now what's your pitch on why I should not allow
7 this?

8 MR. JUSTUS: Yeah, so there's no -- the plaintiffs in
9 this case have no need for additional deposition discovery of
10 Google. I know it's probably clear to the Court, but it's
11 worth pointing out, in this case, the plaintiffs have access to
12 more than 30 Google depositions taken by the DOJ as part of
13 their investigation. Ten depositions taken by the DOJ in the
14 EDVA litigation, and then 24 more depositions that they will
15 take in this litigation.

16 On the other side of the ledger, Google currently has
17 the right to take 15 depositions of the plaintiffs in this
18 case. So there's already a big asymmetry here in terms of them
19 having more access to information. And so granting this relief
20 is going to cause even more asymmetry between the parties, and
21 also, really violate the discovery limits that have been set in
22 this case that sought to give each side an equal number of
23 depositions. That's kind of point one.

24 Point two is this case is pretty close to closing
25 discovery. I mean, we're within about a month at this point.

O5LAGooC

1 We think that the most orderly way for this case to go forward
2 is for the parties to start narrowing their focus, take the
3 discovery that really matters, and take an orderly case into
4 this expert discovery. And dumping almost two dozen more
5 experts -- two dozen more transcripts in the case at this point
6 is going to have the exact opposite effect.

7 I would note that the EDVA in particular was concerned
8 about the effect of dumping just a huge number of Texas
9 transcripts into that case. That case is closer to trial of
10 course. But on that consideration and some others, has already
11 denied this basically same relief when the DOJ sought it in
12 Virginia.

13 I would also point out to the Court that in Virginia,
14 the Court was very concerned that if it had granted the similar
15 relief requested by the DOJ, those transcripts would then be in
16 the EDVA and they could be shared into the MDL by operation of
17 the existing coordination order. That respect for this Court's
18 discovery record kind of naturally goes the other way. So if
19 this court does order that big production into this case, in
20 addition to all the other problems, it's also possibly
21 defeating the ruling of the EDVA.

22 THE COURT: Thank you. Mr. Korologos, a question is
23 how does the production of these transcripts effect the
24 discovery cutoff in this case?

25 MR. KOROLOGOS: Doesn't.

O5LAGooC

1 THE COURT: Is it going to lead to "ah, ha" now I need
2 an extension because I found out something I didn't know
3 yesterday and now I want to pursue it.

4 MR. KOROLOGOS: It will not, your Honor. With the
5 only possible exception a truly good cause that somebody has
6 said something entirely consistent -- inconsistent, your Honor,
7 on the Google side than some position they've taken in this
8 case. I suspect with the good lawyering on the other side,
9 that's not likely to occur. So I don't see any threat to your
10 Honor's fact discovery cutoff.

11 THE COURT: All right. Go ahead.

12 MR. JUSTUS: I was just going to say, your Honor, I
13 think that non-statement is noteworthy, is they're not even
14 willing to say here now that this won't lead to discovery being
15 kicked out further. And this case is really close to being
16 able to go to expert discovery neatly.

17 THE COURT: No. Dually noted on both sides. So this
18 is what I'm going to do, I'm going to reserve on that. Let me
19 think about it a little bit more.

20 Yes?

21 MS. WOOD: Your Honor, Julia Wood for the Department
22 of Justice on behalf of EDVA.

23 THE COURT: Yes.

24 MS. WOOD: I wanted to clarify. Google's papers did
25 make this clear, but I wanted to clarify for the Court.

O5LAGooC

1 Obviously the plaintiffs in the EDVA action are appealing the
2 magistrate judge's ruling. A date will be heard I believe on
3 May 31st. It is currently set for argument in front of Judge
4 Brinkema. So that is not -- that is still a live issue very
5 much in the Eastern District of Virginia. A primary basis for
6 the Court's ruling was some concern about how this Court might
7 view the production of Southern District of Texas transcripts
8 to the EDVA.

9 It has always been our position of course that those
10 transcripts were contemplated as part of the original
11 coordination order that was entered. It was the bargain for
12 piece of that coordination order. We agreed to make sure the
13 depositions were consolidated. Witnesses sat for consecutive
14 days rather than totally different time periods to benefit
15 Google in exchange for an agreement from Google to produce --
16 to allow us access to transcripts that were taken even after
17 our fact discovery was closed.

18 So I just rise to make clear that I didn't want to
19 have the counsel's presentation today leave you with the
20 impression that that was a done issue in the Eastern District
21 of Virginia. We are appealing that decision by the magistrate
22 judge there. That will be heard by Judge Brinkema in due
23 course. And we do feel it is very important to the United
24 States' interest in the level playing field that we have --
25 even though fact discovery is closed -- we have access to the

O5LAGooC

1 same impeachment material. Relevant third parties, for
2 example. It's not just an example of Google witnesses. It's a
3 question of third parties who are on the United States' initial
4 disclosures, who are on Google's disclosures in the EDVA
5 action, who Google, using the same lawyers, are deposing in
6 Texas and then somehow going to put everything out of their
7 mind that they heard in those Texas depositions when they're
8 both strategizing about who to call and how to cross-examine
9 those witnesses at trial.

10 So I don't mean to involve your Honor in EDVA matters,
11 but I did want to make sure the record was clear about the
12 status of that motion and the timing for a decision on that
13 issue.

14 THE COURT: I very much appreciate that. And I have
15 the utmost respect for my colleagues, both in the ED Virginia
16 action and in the Texas action. And have tried, as they have
17 succeeded, in promoting a spirit of noninterference and
18 coordination when coordination is appropriate. So I will say
19 nothing more. And I thank you for that update.

20 MR. JUSTUS: Your Honor, can I press my luck with just
21 two final points?

22 THE COURT: Yes.

23 MR. JUSTUS: One is to respond to one comment from
24 Ms. Wood is she talked about the bargain for benefit of
25 coordination. I think it's important to note, as the Eastern

O5LAGooC

1 District of Virginia magistrate found, the coordination order
2 entered by this Court specifically considered the situation
3 where Texas got remanded, and specifically provided that if
4 Texas gets remanded, all bets for coordination were off. So
5 there's no expectation in the current document that
6 coordination would be ongoing. That's kind of point one I
7 wanted to make.

8 Point two is, and just so I can go home tonight and
9 sleep well, I wanted to make sure I made this point clear.
10 We're not creating any discovery asymmetry. We're not going to
11 use any deposition transcript in this case that they don't
12 have. So this isn't going to mean Google sitting on a stack of
13 30 transcripts that the plaintiffs don't have. The discovery
14 record in this case will be the same for everyone if your Honor
15 denies this relief, or grants our relief and denies their
16 subpoena.

17 THE COURT: Thank you. All right. Is there anything
18 else?

19 MR. KOROLOGOS: Your Honor, given the Court's clear
20 desire to make sure that June 28 is the close of fact
21 discovery, I want to raise one issue that's not before your
22 Honor yet.

23 On May 2, your Honor granted us an additional nine
24 depositions. On May 3, we noticed thirteen depositions to fill
25 out the nine and the ones we still had remaining. We have yet

O5LAGooC

1 to have received a date back from Google to schedule any of
2 those depositions. And I am concerned, given the lateness in
3 the fact discovery period, that we'd be able to do so. And
4 perhaps my colleagues will have an answer to this now. Perhaps
5 they can give us one soon. But I don't want to be before your
6 Honor without giving your Honor a heads up while we're here
7 today that I see this as a potential issue with respect to the
8 fact discovery cutoff.

9 MR. JUSTUS: Your Honor, we're doing all we can to get
10 dates for these depositions and we will continue to move as
11 quick as possible.

12 THE COURT: You'll have them by Friday.

13 MR. JUSTUS: We'll do our absolute best. Yes, your
14 Honor.

15 THE COURT: You'll have them Friday.

16 MR. JUSTUS: Yes, your Honor.

17 THE COURT: Thank you.

18 MR. KOROLOGOS: Thank you, your Honor.

19 THE COURT: Unless there is anything else, we are
20 adjourned.

21 (Adjourned)
22
23
24
25